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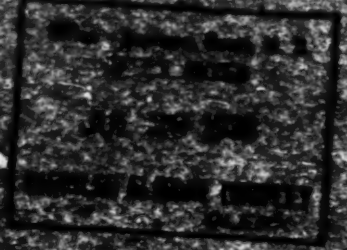

No. 729

In the Supreme Court of the United States

October Term, 1939

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

COLUMBIAN ENAMELING AND STAMPING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

CITATIONS

83915—38——1

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The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on April 28, 1938 (R. 425), denying the petition of the National Labor Relations Board for enforcement of its order against Columbian Enameling and Stamping Company, Inc.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 372–393) are reported in 1 N. L. R. B. 181. The opinions of the Circuit Court of Appeals (R. 415–425) are reported in 96 F. (2d) 948.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, assuming that employees have gone on strike in violation of an agreement between them and their employer, the employer is thereby freed from his obligation under the National Labor Relations Act to bargain collectively with representatives of his employees.

2. Whether such a strike terminates the strikers' status as employees within the meaning of the Act.

3. Whether the fact that such a strike was begun before the passage of the Act terminates the strikers' status as employees, or frees the employer from his duty to bargain collectively with their representative after the passage of the Act.

4. Whether the strike in this case did constitute a breach of the agreement between respondent and its employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Supp. II, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in

a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

SEC. 10:

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

Pursuant to Section 10 (b) of the National Labor Relations Act, the National Labor Relations Board, on November 21, 1935, issued a complaint and notice of hearing, which were duly served upon respondent (R. 7–10). The complaint alleged in substance that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1) and (5), of the Act (R. 8–10). A hearing was held on Decem-

ber 9, 10, and 11, 1935, before a Trial Examiner duly designated by the Board (R. 19–370). Briefs were filed with the Board by respondent and the complainant Union. Thereafter, on February 14, 1936, the Board issued its findings of fact, conclusions of law, and order (R. 372–393). The facts as found by the Board and as shown in the evidence are as follows:

Respondent is engaged in the manufacture and sale of metal utensils and other products and is extensively engaged in commerce among the States and with foreign nations (R. 375–376). On July 14, 1934, respondent and Enameling and Stamping Mill Employees Union, No. 19694 (hereinafter termed the Union) entered into a contract (R. 15–17), effective for one year, which prescribed various conditions of employment and contained the following provision (R. 17):

> In any case in which a satisfactory settlement of a dispute arising under this contract cannot be reached, such dispute shall be referred to a committee of arbitration composed of two persons selected by the Management, two persons selected by the Union, and fifth person to be selected by these four, who shall reach a decision which shall be final and binding upon both parties to this contract. There shall be no stoppage of work by either party to this contract pending decision by the Committee of Arbitration.

On January 4, 1935, the Union, at that time representing 476 of respondent's 500 odd production employees (R. 89, 173), submitted to the respondent a number of demands, including proposals that it be recognized as the bargaining representative of all the employees, that the Union cooperate with the Company in correcting defects in workmanship and in enforcing respondent's rules, that the Company agree to lay off any member of the Union who was suspended from the Union, and that minimum wages be increased at the end of ninety days if by that time unrest had been eliminated and production loss reduced to a normal minimum (Resp. Ex. 1; R. 382).[1] In a circular letter of January 21 to the employees individually, respondent rejected the proposals enumerated above (Pet. Ex. 1). On February 5 the Union wrote respondent asking that the proposals of January 4 be submitted to arbitration pursuant to the provision of the agreement set forth above (Resp. Ex. 14). On February 8 respondent wrote the Union, and at the same time stated in a circular to the employees individually, that it refused to arbitrate on the ground that the proposals of January 4 were not arbitrable under the July 1934 agreement (Pet. Ex. 3, 10).

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[1] These proposals did not include a demand for a closed shop, although the summary of the facts by the court below (R. 416) indicates the contrary. Although such a demand had been made in 1934, it was not renewed in 1935 until March 17. See page 7, *infra*.

The Union subsequently presented other demands to respondent.[2] On March 11 the Union again presented its demands of January 4, and again received an unsatisfactory response (R. 211–212, 315–316). On March 17 the Union sent respondent a copy of resolutions adopted by it in which it declared that, whereas it had consistently adhered to every provision of the agreement, respondent had broken the agreement by refusing to arbitrate the demands made by the Union and by failing to comply with Section 9 of the agreement (see note 2), that respondent had been deliberately seeking to injure the Union by attacking the integrity of the Union Committee and thereby violating the principles of collective bargaining, and that "peace and harmony cannot exist under the present conditions owing to the unfair practices of the Company"; and it was resolved that the men would not continue to work with anyone eligible for Union membership who did not join the Union before March 23 (Pet. Ex. 2). On that day a strike was called (R. 64, 216). About 485 of 500 production employees of respondent were members of the Union at that time, and approximately 450 left

[2] The Union claimed that the employees were entitled under Section 9 of the agreement (R. 16) to two hours' pay for waiting time after a breakdown, and that the Company should stop sending circulars to the employees individually rather than communicating with their representatives (R. 314–315, 209–210; Resp. Ex. 15).

work (R. 173, 176–178, 377, 383).[3] On March 30 respondent announced that the factory was closed indefinitely (Resp. Ex. 16).

Attempts to settle the strike were futile (R. 383–385). Respondent insisted, despite the fact that the vast majority of its employees belonged to the Union, that it would reopen the factory only "as an open shop without union recognition or agreement" (R. 384, Pet. Ex. 14, Resp. Ex. 17).

The strike was still in effect when the National Labor Relations Act was approved on July 5, 1935. On July 19 respondent began to take steps leading to the reopening of its plant (R. 70, 221, 384–385). On July 23, conciliators of the Department of Labor, at the request of the Union, attempted to open negotiations with respondent, and induced the president of respondent to agree to meet with the Union Committee. On that day respondent reopened its plant, and several days later respondent's president told the conciliators, contrary to his original promise, that he would not meet either with them or with the Union (R. 72–73, 143–145, 216, 238, 303–306, 385). By the middle of September respondent had employed a full force, including approximately 215 of the strikers (R. 239, 241–242). On September 20 and again on October 11 the Union wrote asking for a meeting to settle the strike, but received no reply (Pet. Ex. 5, R. 306).

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[3] The Union permitted about 35 men in the power house to remain at work (R. 178, 383).

The Board found that respondent's refusal to bargain with the Union after the request made on July 23 was an unfair labor practice in violation of Section 8, subdivisions (5) and (1), of the Act, and ordered respondent to cease and desist from refusing to bargain with the Union (R. 393). The Board further found that in view of the replacement of the strikers by new men after respondent's refusal to bargain, such an order would be futile unless the situation were restored to the *status quo* existing before the violation of the Act (R. 391). Accordingly, respondent was ordered to reinstate men employed on July 22, 1935, who had not received substantially equivalent employment elsewhere, discharging if necessary persons who were not employed on that date (R. 393).[4]

On July 9, 1937, the Board, pursuant to Section 10 (e) of the Act, filed with the Circuit Court of Appeals for the Seventh Circuit its petition for enforcement of the foregoing order (R. 1–4). On April 28, 1938, the court denied the Board's application (R. 425).

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[4] The order further provided that a preferred list should be created for those individuals employed on July 22 for whom there would be no jobs (R. 393). Back pay was not ordered. Respondent has argued that the order required the discharge of all men employed after July 22, 1935, regardless of whether such discharges were necessary to make room for men previously employed. That is not what the order means; and, as the Board advised the court below, it did not and does not intend the order to have any such effect.

Circuit Judge Evans found that the Board's findings with respect to respondent's refusal to bargain were supported by the evidence and that respondent had engaged in "an open defiant, flouting of the law of the land" (R. 422). He held, however, that the employees had gone on strike in violation of the agreement of July 14, 1934, and had thereby completely severed the employment relation and ended all obligation of respondent to bargain with their representatives (R. 421). Judge Evans further held that such action barred the employees, under the equitable doctrines of unclean hands and estoppel, from seeking relief against respondent's unfair labor practices (R. 421–423). He therefore held that the Board's petition for enforcement of its order should be denied (R. 423). Judge Sparks concurred in the result (R. 423).

Circuit Judge Treanor, dissenting, agreed with Judge Evans that the Board's findings with respect to the unfair labor practices were supported by evidence, but held in addition that the Board's findings that respondent had refused to arbitrate and that therefore the non-stoppage clause of the agreement had not been violated were supported by the record and conclusive upon the court. He further held that the strikers remained "employees" within Section 2 (3) of the Act, and that respondent's duty to bargain continued regardless of whether the strike was in breach of the agreement or not. An unfair labor practice having occurred, Judge Treanor held, the court should not deny en-

forcement to the Board's order upon equitable considerations which were not properly before it (R. 423–425).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the strike violated the agreement of July 14, 1934.

2. In not holding that individuals who cease work in connection with a current labor dispute remain employees for the purposes of the National Labor Relations Act, whether or not their cessation of work was in breach of contract.

3. In not holding that it is an unfair labor practice for an employer to refuse to bargain collectively with the authorized representative of his striking employees in an appropriate bargaining unit, whether or not the strike is in breach of contract.

4. In not holding that the National Labor Relations Act authorizes the National Labor Relations Board to require the reinstatement of striking employees, with whom the employer has wrongfully refused to bargain collectively, whether or not the strike is in breach of contract.

5. In not holding that the defenses of unclean hands and equitable estoppel, based upon conduct of the employees, cannot be urged against or defeat a petition by the National Labor Relations Board for enforcement of its order.

6. In not holding that the fact that the strike began before the passage of the Act had no effect upon the validity of the Board's order.

7. In refusing to enforce the Board's order as supported by the evidence and the findings.

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF LAW CONTRARY TO THE PLAIN LANGUAGE OF THE NATIONAL LABOR RELATIONS ACT

The Circuit Court of Appeals found that respondent's conduct constituted an "open defiant, flouting of the law of the land" (R. 422). It did not indicate that the Board's finding that respondent had refused to bargain with the representative of the majority of its employees was unsupported by evidence, but held to the contrary. Nor did the court hold that the mere occurrence of a strike prior to such refusal had terminated the employee status of the members of the Union.

The court's refusal to enforce the Board's order appears to be predicated both on the hypothesis that the Union had called the strike in violation of the agreement of July 14, 1934, and on the fact that the strike commenced before the passage of the National Labor Relations Act. Upon this basis the court reached the conclusion that the strikers were not employees within the meaning of the Act.

It is clear from the opinion, however, that the fact that the strike commenced before the passage of the Act was regarded as of slight significance, since the court assumed, following *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), cert. den., 302 U. S. 731, and *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9th), cert. den. May 23, 1938, that "ordinarily the status of employer-employee exists, although the strike occurred before the passage of the National Labor Relations Act and continued after its passage" (R. 420). The entire emphasis in the opinion is placed on the alleged breach of contract; no reason is suggested why the conjunction of the two facts should make any difference, and we think it fair to assume that the asserted misconduct of the employees was the true *ratio decidendi.*

This holding of the court below, that, because of what is at most a technical breach of contract by his employees, a public regulatory statute is rendered inoperative and cannot be applied by the Government to restrain the unlawful conduct of an employer is plainly unwarranted under the statute and is contrary to accepted principles of law. Moreover, in arriving at the premise upon which this conclusion was based—that the Union had violated the agreement—the court found it necessary completely to disregard undisputed facts showing that there had been no such violation. The

court's refusal to enforce the Board's order for this reason is thus plainly erroneous because (*a*) even if the strike were in breach of the contract, the court's refusal to enforce the order of the Board was in violation of the statute, and (*b*) the employees did not strike in violation of their contract.

A. EVEN IF THE STRIKE HAD BEEN CALLED IN VIOLATION OF A CONTRACT, THE COURT BELOW SHOULD HAVE ENFORCED THE BOARD'S ORDER

Even if the court below were correct in holding that the Union had broken its contract with the respondent, the court should not have denied enforcement to the Board's order. The Act nowhere provides that employers whose employees have violated agreements shall be exempt from its provisions. On the contrary, the Act declares that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" and *requires* the Board, upon a finding that an employer has engaged in such a practice, to issue a cease and desist order (Sections 8 (5) and 10 (c)).

The court below came to the conclusion that the Board's order was invalid (1) because the breach of contract terminated the employer-employee relationship between respondent and the strikers, and (2) because the doctrines of estoppel and unclean hands precluded the granting of relief to the strikers in a court of equity. The opinion seems

to join these two entirely unrelated propositions together. But whether regarded jointly or separately, the reasoning of the court below in support of them is plainly unsound.

1. The court below conceded (R. 420) that the existence of a strike does not interrupt the employer-employee relationship under the Act; the concession was of course essential in view of the statutory definition of employee as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." Section 2 (3); *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 58 S. Ct. 904.

But the court held that if the strike was called in violation of a contract, the employment relationship no longer continued—a conclusion which can be supported under the statute only if the impropriety of a strike warrants a holding that the strikers have not ceased work in consequence of a current labor dispute. This is plainly a *non sequitur*. As this Court pointed out in the *Mackay* case (58 S. Ct. at 910):

> The wisdom or unwisdom of the men, *their justification or lack of it*, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute. [Italics supplied.]

The decision below adopts the same line of reasoning as that of the same Circuit Court of Appeals in *Michaelson* v. *United States*, 291 Fed. 940, wherein the court held that railroad strikers were not "employees" within the meaning of the Clayton Act because railroad strikes were contrary to public policy and because the strike was called against compliance with a decision of the Railroad Labor Board. In reversing that decision, this Court said in language equally applicable here (266 U. S. 42, at 68):

> To say that railroad employees are outside the provisions of the statute, is not to construe the statute, but to engraft upon it an exception not warranted by its terms. If Congress had intended such an exception, it is fair to suppose that it would have said so affirmatively. The words of the act are plain and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.

2. Although the decision below purports to be based on the termination of the employment relationship resulting from a strike in breach of contract, the court does not discuss the statutory def-

inition of employee; on the contrary the court's argument seems to indicate that the breach of contract would have precluded the granting of relief by the Board even if the strikers had been employees. Here, too, in the language of the *Michaelson* case, *supra*, the court was not construing the statute but engrafting upon it an exception not warranted by its terms.

The tenor of the court's opinion indicates that it regarded the case as an equity suit between the employees and respondent. The *employees* were "estopped" (R. 421, 422); the *employees* were not "entitled to invoke the aid of a court of equity" (R. 423). Those expressions demonstrate that the court misconceives the nature of proceedings before the Board for the enforcement of the Act. The proceeding is not one in equity; it is exclusively statutory. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. at 48. The Board, representing the public interest, is the complainant in such proceedings. *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146 (C. C. A. 5th). The Union is not the moving party and the Board is not estopped or chargeable with unclean hands by reason of the conduct of the Union. As the Circuit Court of Appeals for the Ninth Circuit declared in *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, 146, certiorari denied, No. 907, Oct. Term, 1937:

> Respondent contends that the proceeding before us is an equitable proceeding; that the union's picketing resulted in violence, as the Board found, which was a violation of the laws of Washington, and therefore enforcement should be denied for the reason that the union has not come into the court with clean hands. It is not the union, but the Board, which is asking enforcement.

See to the same effect *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872–873; certiorari denied, No. 970, Oct. Term, 1937.

But there is another equally fundamental reason why an employer is not exculpated by the improper acts of his employees. The Board's cease and desist orders look to the future; their purpose is to prevent the recurrence of conduct found by Congress and recognized by this Court to be "prolific causes of strife" which burden interstate commerce (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, at 42). The purpose of the Act is not to be achieved by leaving the employer free to engage in unfair labor practices whenever his employees or their representatives have acted unlawfully. Remedies are available against the illegal acts of employees in the state civil and criminal courts and under other statutes than this Act. The Act was not meant to cover the entire field of labor relations. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*,

supra, at 46. This was specifically recognized in the report of the Congressional committees recommending the passage of the Act.[5]

A distinction may be drawn between the effect of unlawful acts by strikers upon the power of the Board to issue cease and desist orders and the scope of affirmative relief to be granted in a particular case. The statute imposes upon the Board the mandatory duty of issuing a cease and desist order upon proof that an employer has engaged in an unfair labor practice, and the definitions of the unfair labor practices contain no exception for cases in which the employees have acted unlawfully (Sections 10 (c) and 8). It would be an abuse of author-

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[5] Compare the following statement by the Committee on Education and Labor of the Senate (Sen. Rep. No. 573, 74th Cong., 1st Sess.) in rejecting the proposal that the Board have power to prevent burdens to commerce occasioned by employee action (pp. 16–17):

"Nor can the committee sanction the suggestion that the bill should prohibit fraud or violence by employees or labor unions. The bill is not a mere police court measure. The remedies against such acts in the State and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest. * * * In addition, the procedure set up in this bill is not nearly so well suited as is existing law to the prevention of such fraud and violence. * * * The only results of introducing proposals of this sort into the bill, in the opinion of the committee, would be to overwhelm the Board in every case with counter-charges and recriminations that would prevent it from doing the task that needs to be done."

This section of the report was quoted with approval by the Committee on Labor of the House of Representatives (H. Rept. 1147, 74th Cong., 1st Sess., p. 16).

ity under the Act for the Board to refuse to issue a cease and desist order because of the employees' improper conduct. In the granting of affirmative relief, however, there is room for the exercise of discretion, since the Board is empowered to order the taking of "such affirmative action * * * as will effectuate the policies of this Act" (Section 10 (c)). The Board has recognized that unlawful acts of strikers may make it inappropriate to grant affirmative relief which inures to their benefit. See, *e. g., In the Matter of Kentucky Firebrick Co. and United Brick and Clay Workers of America, Local Union, No. 510,* 3 N. L. R. B. No. 46; *In the Matter of Standard Lime & Stone Co. and Branch No. 175, Quarry Workers International Union of North America,* 5 N. L. R. B. No. 15.

The court below did not differentiate between the negative and affirmative portions of the Board's order, but invalidated it as a whole on the ground that the strikers had acted in breach of contract. Such a decision is plainly unwarranted under the statute.

In any event, however, there can be no question as to the appropriateness of the affirmative relief granted in this case. The Board ordered the respondent to reinstate (without back pay) strikers replaced by new men upon respondent's refusal to bargain with their representative. Ordering respondent to obey the law would have been futile, as the Board found, if respondent could have refused to reemploy the members of the Union who

continued on strike after the commission of the unfair labor practice. It can not be said that the strikers' prior conduct rendered the order of reinstatement any the less appropriate. There was a dispute between the Union and respondent as to which first violated the agreement. Such a dispute is of the kind usually settled in the civil courts. The losing party in a suit for breach of contract is not commonly treated as a law breaker, and the winning party is not thereby exempted from the operation of statutes prohibiting conduct regarded by the legislature as contrary to public policy.

In any event, it was for the Board and not for the court below to infer from the evidence whether or not ordering reinstatement in this case would effectuate the policies of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. The court below did not hold that the Board's finding that the relief was appropriate was unsupported by evidence; it merely substituted its conclusion for that of the Board, and "this can not be done." *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482. The court treated the case as if it were an equity suit being tried *de novo* before it rather than a review, subject to statutory limitations, of a decision of the National Labor Relations Board. The court clearly had no power to determine the case on any such basis.

B. THE STRIKE DID NOT CONSTITUTE A BREACH OF CONTRACT

In concluding that the strike called by the Union was a breach of contract, the court relied entirely upon the provision in the agreement of July 14, 1934, that "There shall be no stoppage of work by either party to this contract pending decision by the Committee of Arbitration" (R. 420, 423, 17). The court did not dispute the findings of the Board that on January 4, 1935, the Union made certain demands on respondent, that respondent rejected these demands, that the Union requested arbitration pursuant to the agreement, and that respondent refused the request on the ground that the questions were not arbitrable. While the court enumerated these facts in a footnote to its opinion (R. 416–417), it ignored them completely in deciding that the Union had violated the contract.

We need not here consider whether respondent was justified in refusing to arbitrate the demands. If respondent's position that the demands were not arbitrable under the agreement was correct, the Union was not required to refrain from stopping work "pending decision by the Committee of Arbitration," and accordingly the strike did not constitute a breach of the agreement. If, on the other hand, the demands were arbitrable, respondent itself violated the agreement by refusing to permit their submission to arbitration, and the Union was released from its promise not to strike pending

arbitration. See Pet. Ex. 2, p. 7, *supra*. Whichever view is taken, it is clear that the Union's action in calling a strike without awaiting arbitration was not a breach of contract. In entirely disregarding the Board's findings of fact that the Union had sought to arbitrate the matters in controversy and that respondent had refused, the court violated the express statutory direction that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive" (Section 10 (e)). *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261.

II

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH A DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In *National Labor Relations Board* v. *Remington* Rand, Inc., 94 F. (2d) 862, certiorari denied, No. 970, Oct. Term, 1937, the Board found that the company had refused to bargain collectively with the union representing the majority of its employees, in violation of Section 8 (5) of the Act. The company contended in the Circuit Court of Appeals that the union had called a strike in violation of a binding contract, that the union had been guilty of violence during the strike, and that because of such misconduct by the union the Board's order should not be enforced (see respondent's brief in the Circuit Court of Appeals, pp. 35–37). The Circuit Court of Appeals for the

Second Circuit found it unnecessary to determine whether the union had in fact been guilty of the alleged misconduct. Assuming the charge to be well founded, the court held it to be immaterial. The court declared, in language plainly demonstrating the existence of a conflict[6] between that case and the decision of the Circuit Court of Appeals for the Seventh Circuit here (94 F. (2d) 872–873):

> There remains only the defence raised by the respondent that the union has disqualified itself by its own misconduct from appealing to the Board; a carry over from the doctrine of equity that the court will not intervene in favor of one who has been guilty of wrongful conduct in the transaction in question. This defence was overruled in *National Labor Relations Board* v. *Carlisle Lumber Co., supra,* 94 F. (2d) 138, and we agree, although our reasons go beyond the procedural peculiarity that the Board is the petitioner. * * * the conduct of a

[6] In its reply to the Board's brief in opposition to the granting of a writ of certiorari, Remington Rand, Inc., pointed out that the decision in that case conflicted with that of the Circuit Court of Appeals for the Seventh Circuit in the *Columbian* case, which had been decided since the filing of the petition for certiorari. Despite the conflict on the point here involved, it is believed that this Court properly denied certiorari in the *Remington Rand* case, inasmuch as the question of the effect of the misconduct of the employees was not a substantial one on the facts there presented, and was correctly decided by the Circuit Court of Appeals for the Second Circuit.

union, like that of an employer, not only during the negotiations when there are any, but before there are, may be relevant in ascertaining whether the proposal to confer is genuine, or only part of the tactics of the fight. Nothing else can be material; though the union may have misconducted itself, it has a locus poenitentiae; if it offers in good faith to treat, the employer may not refuse because of its past sins. * * *

III

The Primary Question Presented is of Great Public Importance

The question whether misconduct by employees has the result of exempting their employer from the National Labor Relations Act is a question of public importance which should be decided by this Court. Various aspects of this problem have arisen in cases before the Circuit Court of Appeals, and the different courts have adopted varying and, in some cases, conflicting methods of dealing with it. See, in addition to the instant case, *National Labor Relations Board* v. *Fansteel Metallurgical Corp.* (C. C. A. 7th, decided July 22, 1938); *National Labor Relations Board* v. *The Kentucky Fire Brick Company* (C. C. A. 6th, decided June 29, 1938); *Standard Lime & Stone Co.* v. *National Labor Relations Board* (C. C. A. 4th, decided June 3, 1938); *National Labor Relations Board* v. *Remington-Rand, Inc., supra; National Labor Relations Board* v. *Carlisle Lumber Co., supra.* In the

recent *Fansteel* case, the Circuit Court of Appeals for the Seventh Circuit went so far as to hold that an employer's unfair labor practices in using labor spies, in dominating and supporting a "company union," and in refusing to bargain collectively, could not be prohibited by the Board because of misconduct by his employees.

The establishment of an exemption of the kind approved by the court below would seriously limit the intended scope of the Act. As has been pointed out, an employer injured by the misconduct of his employees has various familiar remedies available in the ordinary civil and criminal courts (*supra*, pp. 18–19). The purpose of the National Labor Relations Act is to safeguard commerce by guaranteeing to employees protection of the rights conferred by this statute.

It is particularly important that exemptions from the Act be not created for all employers whose employees have broken contracts. As collective bargaining becomes common, collective agreements between employers and employees will become more numerous and comprehensive. If the application of the Act is to depend upon technical compliance with the terms of such agreements, a large number of industrial disputes may be removed from its scope. It is not always easy to determine which side first violates an agreement. Moreover, would the employees involved lose their right to choose representatives and to bargain through them? Is the protection of the Act withdrawn from all em-

loyees because of the misconduct of some? These roblems do not arise if the Act is construed ac- ording to its plain terms. They do arise under ie doctrine enunciated by the court below.

CONCLUSION

Wherefore it is respectfully submitted that this etition for a writ of certiorari to review the judg- ent of the Circuit Court of Appeals for the eventh Circuit should be granted.

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JULY 1938.

GOVERNMENT PRINTING OFFICE: 1938